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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959.

No. 246

JOHN SYPERT,

Petitioner,

vs.

HONORABLE JULIUS H. MINER, a Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Question Presented	1
Statement of the Case	2
Reasons for Denying Certiorari	7
I No Conflicting Question of Federal Law is Involved	7
II The Denial of the First Motion to Transfer Did Not Bar the Subsequent Motion After a Disagreement	9
III The Question of a Transfer Under Section 1404 A Rest in the Sound Discretion of the Trial Court	11
IV The Court of Appeals Did Not Err in Denying the Petition for Mandamus	13
Conclusion	14

CITATIONS

All States Freight v. Modarelli, 196 F.2d 1010	13
Atlantic Coast Lines v. Davis, 185 F.2d 766	7
Blaski v. Hoffman, 260 F.2d 317 (CA 7, 1958)	8
Chicago, Rock Island and Pacific Ry. Co. v. Igoe (7 Cir.) 212 F.2d 378 at p. 382	12, 13
Ex parte Blaski, 245 F.2d 737 (CA 5, 1957)	8
Ex parte Collett, 337 U. S. 55	12
Fallbrook Public Utility Dist. v. U. S. Dist. Ct. (202 F.2d 942)	11

PAGE

Goodman v. Southern Ry. Co., 99 F. Supp. 812 10

Great Northern Ry. Co. v. Hyde, (8 Cir.) 245 F.2d 537 13

Harwick v. Atlantic Coast Line R.R. Co., 129 F. Supp. 558 10

Kilpatrick v. Texas & Pacific Railway Co., 337 U. S. 75 12

Loew's Inc. v. McGuire, 92 App. DC 319, 205 F.2d 719 14

Norwood v. Kirkpatrick, 349 U.S. 29 12

Pope v. Atlantic Coast Line R. Co., 345 U. S. 379 12

Riley v. Union Pacific Co., 177 F.2d 673 11

Schden v. Mountain Producers Corporation, (Del.) 170 F.2d 707 10

Torres v. Walsh, (CA 2) 221 F.2d 319 13

United States v. National City Lines, Inc., 337 U.S. 78 12

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTION PRESENTED.

The Petitioner's concept of the question presented is predicated upon his assertion that there was "*no change in the factual situation*" after the first Petition under Sec. 1404(a) was filed. This contention is not supported by the record. Both the trial Judge and the Court of Appeals found otherwise. In effect, the Petitioner must necessarily contend that the Trial Court abused his discretion in granting the transfer and that the Court of Appeals abused its discretion in denying the Petition for Mandamus.

STATEMENT OF THE CASE.

The Petitioner's statement of the case is inadequate to present the issues here involved. An accurate statement of the facts upon which the Petition for Transfer was allowed is shown in the following excerpt of the Answer of the trial Judge to the Petition for Mandamus to expunge the order of transfer.

1. The accident occurred on August 18, 1952, in the plant of Chance-Vought Corporation in Dallas, Texas.

2. On said date and prior thereto the Petitioner, John Sypert (Plaintiff in the District Court), was and still is a resident of the City of Dallas in the state aforesaid and the Defendant, Bendix Aviation Corporation, was and still is a corporation duly organized and existing under the laws of the State of Delaware.

3. On September 8, 1953, the Plaintiff, John Sypert instituted suit in the United States District Court for the Northern District of California, which suit was dismissed on January 21, 1954, without prejudice on Plaintiff's Motion.

4. On January 29, 1954, the Defendant, Bendix Aviation Corporation, received a permit to transact business in the State of Texas and at the same time appointed a registered agent who resided in Dallas, Texas, which facts were a matter of public record in the State of Texas.

5. On August 3, 1954, more than 6 months after the appointment of a registered agent in the State of Texas, the Plaintiff instituted suit in the United States District Court of Illinois and thereafter on September 24, 1954, the Defendant filed its answer to said complaint and the cause was assigned to the Honorable Julius J. Hoffman, one of the judges of the United States District Court for the Northern District of Illinois, Eastern Division.

6. On October 26, 1954, the defendant filed a motion to transfer the cause to the State of Texas under Title 28, Section 1404 (a) which motion was supported by affidavit and set forth in substance that the Plaintiff, John Sypert, at that time resided in Dallas, Texas; that the accident occurred in Dallas, Texas; that the Plaintiff was treated at the Baylor Hospital in Dallas, Texas, subsequent to the accident; that he was attended by four or more doctors, all of whom reside in and have their offices in Dallas, Texas; that all of the witnesses to the accident, both for the plaintiff and the defendant, reside in or near Dallas, Texas; that the cost of bringing witnesses to Chicago from Dallas, Texas, would entail great expense as well as loss of time of such witnesses; that the State of Texas being the place of the accident, the laws of that state and not the laws of Illinois would govern the question of liability and that for the convenience of parties and the witnesses and in interest of justice the cause should be transferred to the United States District Court for the Northern District of Texas, Dallas Division.

7. Lengthy briefs and suggestions together with affidavits were filed in support of and in opposition to said motion and thereafter on October 31, 1955, the motion to transfer the case to the State of Texas was denied by the Honorable Julius J. Hoffman.

8. On January 13, 1958, trial was commenced before Hon. Julius J. Hoffman and the cause was submitted to a jury and after a full three weeks of trial, the jury was unable to agree upon a verdict and a mistrial was accordingly declared and the cause was thereafter assigned to the Respondent.

9. On March 15, 1958, the defendant again moved the Court to transfer the cause to the State of Texas under Section 1404 (a) with supporting affidavits and from these affidavits, records before the Court, and the several briefs filed, it appeared that:

(a) Five of the witnesses testifying in the trial resided in Dallas, Texas, at the time of the trial and were transported from Dallas, Texas, to Chicago for the purpose of the trial.

(b) One witness, a Mr. Carter, who testified for the plaintiff on rebuttal was also a resident of Dallas, Texas, and was transported from Dallas to Chicago and returned on two occasions during the trial.

(c) One witness, a physician, who testified for the plaintiff and who first examined him after the trial had commenced, was a resident of Cook County.

(d) The only other witness testifying in behalf of the plaintiff at the trial was Chief Petty Officer John Trunda who was stationed at the Naval Air Station at Glenview, Illinois, and who was first brought into the case by plaintiff's attorney the day before the trial was commenced and who testified to the workings of an oxygen regulator.

(e) Of the four witnesses testifying on behalf of the defense three resided in and were necessarily transported from Dallas, Texas, to Chicago at the time of the trial.

(f) The only other witness testifying in behalf of the defendant was Wesley Sprague, a mechanical engineer, employed by the defendant who was transported from Davenport, Iowa, to Chicago at the time of the trial.

(g) The testimony of several witnesses, all of whom reside in Dallas, Texas, had to be offered by means of deposition.

(h) Other witnesses who resided in Texas did not testify in the trial and could not be brought in by process of this court.

(i) The defendant contended that certain documents, reports and exhibits available and subject to production by Subpoenas in the United States District Court of Dallas, Texas, could not be made

available in this district through lack of process and had to be omitted in the trial.

(j) The facts in the instant motion for transfer were different in many respects from those which arose in the original motion.

(k) It appears that every occurrence witness resides in or near Dallas.

(l) The only witnesses in behalf of either party who did not reside in or near Dallas, Texas, were John Trunda, Chief Petty Officer in the United States Navy, stationed at Glenview, Illinois, Wesley Sprague, a mechanical engineer, who was brought here from Iowa, and an examining physician who examined the plaintiff in Chicago and testified in behalf of the plaintiff.

(m) For a period of more than six months prior to the filing of the action in the United States District Court for the Northern District of Illinois, Eastern Division, the defendant was amenable to service of process in the Texas District, so that at the time of the institution of the action in Illinois there were at least two districts in which the action might have been filed.

(n) The Order of Judge Hoffman denying prior motion for transfer to the State of Texas was not *res judicata*.

(o) The question was not a question of improper venue and the defendant did not waive its right to present a second motion for transfer to the State of Texas where the facts which appear in the trial of the cause established that the cause should have been transferred in the first instance to the United States District Court of Texas for the convenience of the witnesses and in the interest of justice.

(p) There was no showing that the witness, John Trunda, could not conveniently go to Texas if the case was transferred to that district.

(q) It does not appear that expert testimony comparable to the testimony given by John W. Trunda could not be obtained if the case were transferred to Texas as this witness admitted upon cross examination at the trial before the Hon. Judge Hoffman that:

> "The first time he heard of the case and the first time he met the plaintiff or Mr. Dooley or Attorney Wilson was on January 12, 1958, about noon time, Mr. Dooley called John Trunda on the telephone at Glenview, Illinois, and asked if he might come to see him. This was the day that Mr. Sypert * * *, Mr. Dowdy, with plaintiff's attorney, John B. Wilson, arrived by plane from Dallas, Texas, and for the first time discussed with John Trunda at Glenview, oxygen regulators and their operations." (Exhibit 7, page 58).

It also appears from the record that John W. Trunda was not a highly trained expert in the field of oxygen regulators and that he had only two short courses and no instructions on oxygen regulators and their operations.

(r) Glenview Naval Air Station was not a major overhaul station and that only certain adjustments and replacements of parts were permitted to be made at the Glenview Naval Air Station while there were four major overhaul stations of the United States Navy for oxygen regulators. These are located at Corpus Christi, Texas, Pensacola, Florida, San Diego, California, and Quonset Point, Rhode Island. At any one of these four major overhaul stations, oxygen regulators could be completely overhauled, tested and replaced. Certainly at these Naval Air Stations experts could be obtained in the fields of oxygen regulators, and as one of the major "overhaul stations" is located at Corpus Christi, Texas, it would appear that there would not be much difficulty in

obtaining an expert in the same state in which defendant seeks to transfer this lawsuit.

(s) It does not appear in the record that any witness testifying for either party could not be available as a witness in the Texas District.

(t) It was assumed that extensive preparation was required by Mr. Dooley in the preparation for the trial of this cause, but it also appears that the original lawyer for the plaintiff was John B. Wilson, Jr., who is a resident practitioner in the State of Texas; that Mr. Wilson took divers depositions in Texas; is well acquainted with the divers facts as well as the law applicable to this case and is an experienced trial lawyer and was present almost constantly in the trial of this cause in this district and that he still represents the plaintiff.

(u) There being, at the time suit was instituted in Chicago at least two jurisdictions where the defendant was amenable to process the question of transfer rested in the sound discretion of the trial Court.

(v) The court took into consideration the congested condition of the calendar in this district and length of time that would be required before the case could be brought to trial in this district.

REASONS FOR DENYING CERTIORARI.

I.

No Conflicting Question of Federal Law is Involved.

The Petitioner maintains that there is a conflict between the decisions of the Fifth Circuit in the case of *Atlantic Coast Lines* v. *Davis*, 185 F. (2d) 766 and the case at bar. A careful reading of the two cases demonstrates the fallacy of this contention. The *Davis* case came to the United States Court of Appeals on mandamus to require the trial court to expunge an order transferring the case to New York.

In that case Flora Davis, Administratrix, instituted an action in the U. S. District Court for the Southern District of New York based upon F. E. L. A. for injuries to her husband while in the railroad's employ. The Southern District of New York was a permissible venue. Upon a proper motion made by the defendant in the New York Court the case was transferred to the Southern District of Florida. It was there that the fatal injuries were suffered and it was there that all the witnesses resided. Subsequently two trials were held in the Florida District Court, both of which resulted in a mistrial. After the second trial on oral motion of the plaintiff the Court ordered the case back to the District Court of New York, *solely for the reason that there had been two mistrials in the Florida Jurisdiction.*

In the *Davis* case the Court of Appeals held only that the mere fact there had been two mistrials did not justify the court wholly ignoring the convenience of the parties and witnesses and for this reason expunged the order of re-transfer. This is a far cry from the facts in the case at bar, where it clearly appears that the convenience of the parties and the witnesses is the basis for the transfer. It is respectfully submitted that the *Davis* case is entirely without application on this issue.

The case of *Blaski* v. *Hoffman*, 260 F. 2d 317 (CA 7, 1958) and its companion case *Ex Parte Blaski*, 245 F. 2d 737 (CA 5, 1957), cited by the Petitioner, has no bearing whatsoever upon any issue involved in this case. The facts in the *Blaski* case are not comparable to the facts of the case at bar. The decisions in the *Blaski* case were predicated upon conflicting interpretations of Section 1404(a), Title 28 U.S.C.A. The conflict in the opinion was a basic conflict on the law involving the phrase "*where the action could have been brought*". In the instant case that question is not involved.

The case at bar presents no substantial question of Federal law not heretofore determined by this Court. There is no departure from accepted judicial procedure. There is no conflict in the decisions of this Court or any Court of Appeals. No jurisdictional question is involved. Essentially, this case presents questions of fact peculiar to the case at bar which must be left to the sound discretion of the trial court on a Petition to Transfer under Section 1404(a) and to the Court of Appeals in a mandamus action. The question arising under the particular facts in the instant case has no far-reaching implications and to disturb the decision would only encourage "forum shopping" and increase the already over-burdened Federal Courts in this District.

II.

The Denial of the First Motion to Transfer Did Not Bar the Subsequent Motion After a Disagreement.

In the instant case the Defendant moved the Court in ample time before trial to transfer the cause to the Texas District. This motion was denied. After a three-week trial which ended in a disagreement, it became apparent to any disinterested person that a second trial in Illinois would not serve the convenience or the best interest of the parties.

In the trial Court the plaintiff argued that the denial of the defendant's previous motion to transfer this case is *res judicata* and that "*another judge of the same Court cannot reverse and set aside*" *that order.* In this Court he merely substitutes the phrases "abandonment of jurisdiction" and "waiver of venue" for the phrase "*res judicata*". His argument in both instances is equally untenable.

Petitioner's argument on this issue is bottomed on the erroneous contention that there was no "change in circumstances" in the interim between the two petitions. His contention in this regard is negated both by the trial court's finding and the decision of the Appellate Court.

It is well established law that a court may at any time before final judgment reconsider, vacate, and set aside any order made in the proceedings and that the doctrine of *res judicata* is applicable only to final judgments and decrees, and not to interlocutory orders.

In the case of *Goodman* v. *Southern Ry. Co.*, 99 F. Supp. 812, where the first motion for transfer was denied it was held that the defendant could renew its application at a later date. Plaintiff's contention that *res judicata* is applicable is wholly without merit.

In the case of *Levenson* v. *Little*, D.C.N.Y., 81 F. Supp. 103 the Court held that a delay of more than a year in making a motion to transfer the action to another more convenient forum in which it might have been brought originally should not in itself defeat the motion, if it was found to be otherwise well grounded.

In the case of *Schden* v. *Mountain Producers Corporation*, (Del.) 170 F. 2d 707, a stockholder's derivative suit was dismissed on ground of improper venue as to part of the defendants. The court hek that even after remandment it was proper for the district court, under Title 28, Section 1404 (a), in interest of justice, to transfer civil action to any other district where it might have been brought and to permit defendants to amend their motion to transfer under this section.

In the case of *Harwick* v. *Atlantic Coast Line R.R. Co.*, 129 F. Supp. 558, the defendant did not move for a transfer until more than six months after its motion to

dismiss for lack of jurisdiction had been overruled and not held that the delay alone would not require a denial of the motion to transfer.

The cases of *Fallbrook Public Utility Dist. v. U. S. Dist. Ct.* (202 F. 2d 942) and *Riley v. Union Pacific Co.*, 177 F. 2d 673 cited by the petition are not in point and do not support petitioner's contention that the defendant waived its right to renew its motion for a transfer after a three-week trial when the facts disclosed that every fact witness who testified in the case had to be transported from Texas to Chicago.

III.

The Question of a Transfer Under Section 1404(a) Rest in the Sound Discretion of the Trial Court.

The trial court opinion clearly states that the court had before it not only the motions for transfer but also the Court records, the affidavits, and counter affidavits, the several briefs and suggestions of the parties. The Court heard and considered the oral arguments of the parties and various documents, including the depositions filed. Based on these matters the Trial Court found that the case should be transferred for the "convenience of the parties and in furtherance of justice".

The purpose of Section 1404 (a) of the Federal Rules of Civil Procedure is to give the court broader power to transfer to another District than would have been the case under the doctrine of *forum non conveniens*. It was designed, in part, to remedy the evils of "forum shopping," and to afford relief to the defendant by placing him on an equal footing with the plaintiff in the selection of a forum for trial.

Since enactment of Title 28 U.S.C. §1404 (a), the United States Supreme Court has considered a number of cases involving its application. (*Ex parte Collett*, 337 U.S. 55; *Kilpatrick* v. *Texas & Pacific Railway Co.*, 337 U.S. 75; *United States* v. *National City Lines, Inc.*, 337 U.S. 78; *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379; *Norwood* v. *Kirkpatrick*, 349 U.S. 29). The law is well established that the question of transfer under Section 1404 (a) rests in the sound discretion of the trial judge. (*Chicago, Rock Island and Pacific Ry. Co.* v. *Igoe*, 212 F. 2d 378; *All States Freight* v. *Modarelli*, 196 F. 2d 1010).

Petitioner's sole argument is predicated upon the assumption that John W. Trunda, his expert witness, and the only witness residing in Illinois could not attend in Texas. Just why he could not attend is nowhere explained in the record. Trunda admitted, on cross-examination, that the first time he heard of the case was on the day before the trial commenced in Chicago. Trunda was not the highly trained expert in the field of oxygen regulators, as suggested by Petitioner's counsel. The facts are that he had two short courses and no instructions on oxygen regulators while in the Navy. It is also a fact that Glenview Naval Air Station was not a major overhaul station and that only certain adjustments and replacements of parts were permitted to be made at the Glenview Naval Air Station while there were four major overhaul stations of the United States Navy for oxygen regulators. These are located at Corpus Christi, Texas; Pensacola, Florida; San Diego, California; and Quonset, Rhode Island. At any one of these four major overhaul stations, oxygen regulators could be completely overhauled, tested and replaced. Certainly at these Naval Air Stations experts could be obtained in the field of oxygen regulators, and as one of the major "overhaul stations" is located at Corpus Christi, Texas.

The trial court in the instant case was confronted with another long trial in a jurisdiction where the plaintiff is not a resident; where the accident did not occur and where none of the fact witnesses reside. The trial court did not abuse his discretion in allowing the transfer.

IV.

The Court of Appeals Did Not Err in Denying the Petition for Mandamus.

It is well established that Mandamus is an extraordinary remedy. The writ is not awarded as a matter of right. One seeking the writ must show a clear right to it. It should not be awarded in doubtful cases or where the question is one of discretion for the trial court. A Court of Appeals should not award the writ unless there is a clear abuse of discretion.

In the case of *Torres* v. *Walsh*, (CA 2) 221 F. 2d 319, it was held that the Court of Appeals may not consider the question of whether the trial judge abused his discretion under section 1404(a) unless it finds that there is something extraordinary in the case.

In the case of *Great Northern Ry. Co.* v. *Hyde*, (8 Cir.) 245 F. 2d 537, the Court of Appeals held that the power of court of appeals to issue writs did not warrant a writ of mandamus to command a district judge to vacate his order transferring a case from district of Minnesota to northern district of California in which district action could have been brought even though the transfer constituted an erroneous exercise of discretion.

In the case of *Chicago, Rock Island and Pacific Ry. Co.* v. *Igoe*, (7 Cir.) 212 F. 2d 378 at p. 382, the Court in passing upon the prerogative of courts of appeal jurisdictions to pass upon a motion under Section 1404 (a) said:

> "Ultimate decision on that motion is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court."

In mandamus proceedings to compel district judge to grant motion for change of venue under 1404 (a) the judge's statement that he had considered the convenience of parties and witnesses and the interest of justice has been held conclusive on the reviewing court. *Loew's Inc. v. McGuire*, 92 App. DC 319, 205 F. (2d) 719.

CONCLUSION.

For the reasons herein set forth and those expressed by the Court of Appeals in its opinion it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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